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Supreme Court, U.S.
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01-400

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

RICKY BELL, Warden

Petitioner

v.

GARY BRADFORD CONE,

Respondent

MOTION TO PROCEED IN FORMA PAUPERIS

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Comes now your petitioner, Gary Braford Cone, and moves this Honorable Court pursuant to Rule 39 of the United States Supreme Court Rules to proceed in forma pauperis. In support of this motion, your petitioner would show the Court that:

1. Gary Cone was declared indifent by the district court, and allowed to proceed in forma pauperis pursuant 28 U.S.C. §1915. Robert Hutton and Paul Bottei were appointed as counsel for Mr. Cone purusant to 21 U.S.C. §848(q). Additionally, Gary Cone was allowed to proceed in forma pauperis on appeal, and Robert Hutton and Paul Bottei were reappointed to represent him before the Sixth Circuit.

2. Since Mr. Cone was allowed to proceed in forma pauperis in both the district court, and the United States Court of Appeals for the Sixth Circuit, Rule 39 allows Mr. Cone to proceed before this Honorable Court in forma pauperis.

WHEREFORE PREMISES CONSIDERED, Gary Cone prays this motion to proceed in forma pauperis be granted.

Respectfully Submitted,

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No. 01-400

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

RICKY BELL,

Petitioner

v.

GARY BRADFORD CONE,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court should grant certiorari where the Petitioner has misstated the facts in his questions presented, incorrectly asserting that the lower court applied an improper standard of review?

2. Should this Court grant certiorari where the lower court properly stated and applied the legal standards governing Gary Cone's claim of ineffective assistance of counsel at sentencing; where the facts of the case are unique, undisputed, and never likely to recur; and where the court of appeals correctly reached the unexceptional conclusion that Gary Cone was denied the effective assistance of counsel and is entitled to habeas relief because counsel presented no mitigating evidence at sentencing and made no closing argument in support of a life sentence?

3. Should this Court should grant certiorari to review the judgment below, where the judgment must be affirmed on numerous alternative grounds including: the withholding of exculpatory evidence; the presentation of false testimony; unconstitutional instructions on the meaning of reasonable doubt and malice; unconstitutional application of aggravating circumstances; ineffective assistance of counsel; improper jury instructions requiring unanimity in the finding of mitigating circumstances; systemic exclusion of women from the grand jury; and denial of the right to counsel during trial?

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STATEMENT OF FACTS AND STATEMENT OF THE CASE

A.
FEDERAL HABEAS PROCEEDINGS

In the United States District Court, Gary Cone filed a petition for writ of habeas corpus raising various claims of constitutional error, including challenges of ineffective assistance of counsel, the withholding of exculpatory evidence, the presentation of false testimony, unconstitutional aggravating circumstances, and unconstitutional jury instructions.

1.
INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING

In federal habeas proceedings, Gary Cone asserted he was denied the effective assistance of counsel because counsel failed to present mitigating evidence at sentencing and, following the prosecution's argument seeking imposition of the death sentence, counsel remained silent. See Petition For Writ Of Habeas Corpus, ¶40. The District Court, however, denied relief on this claim.

2.
WITHHOLDING OF EXCULPATORY EVIDENCE

Gary Cone also alleged that the prosecution withheld material exculpatory evidence at trial. Specifically, where the defense was insanity, where the prosecution claimed that Gary Cone never used drugs, and where the entire dispute at trial was about Gary Cone's mental state, Gary Cone asserted that the prosecution withheld extensive evidence establishing that he suffered a long history of drug use and confirming his defense that he was insane.

Specifically, Gary Cone asserted that the prosecution had withheld numerous District Attorney documents, as well as F.B.I. documents (obtained for the first time through discovery in federal court) which detailed Gary Cone's history of heavy drug use at and around the time of the offense (Petition For Writ Of Habeas Corpus, ¶39). Those documents included evidence which demonstrated that Mr. Cone was indeed addicted to drugs and suffering from mental illness, and evidence which would have impeached assertions to the contrary made by both the prosecution in its argument and by rebuttal witnesses Sergeant Roby, Ilene Blankman, and Agent Flynn.

Evidence withheld by the prosecution and never heard by the jury falls into four separate categories.

First, the prosecution withheld statements showing that Gary Cone was indeed heavily using drugs and on drugs at and around the time of the offense, including statements of: (1) Robert McKinney, who stated that two days before the killings, Gary Cone "acted real weird" and appeared to be on drugs;[1] (2) Charles and Debbie

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[1] District Attorney's File, Documents 1081-1084. (R. 71 Petition For Writ Of Habeas Corpus, ¶39a.v.; R. 165 Motion To Expand The Record, Ex. 2).

Slaughter, who said that Gary Cone "looked wild eyed" the day before the killings;[2] (3) Sergeant Grieco of the Pompano Beach, Florida, Police Department who described Gary Cone as "frenzied" and "agitated" just days after the killings;[3] and Chief Daniels of the Lake Village, Arkansas Police Department, who informed authorities that Gary Cone "was a heavy drug user."[4]

Second, the prosecution withheld evidence which would have impeached Officer Roby and shown the falsity of Roby's assertions to the jury that there was no evidence Gary Cone used drugs, including: evidence that Roby knew that Gary Cone was a heavy drug user, having personally sent A.P.B.s throughout the nation warning that Gary Cone was not only a "drug user,"[5] but a "heavy drug user;"[6] and proof that Roby had been told by Gary Cone's sister that he "has a severe psychological problem" and

[2] District Attorney's File, Documents 90, 167-169. (R. 71 Petition For Writ Of Habeas Corpus, ¶39a.iv; R. 165 Motion To Expand The Record, Ex. 2).

[3] District Attorney's File, Document 623. (R. 71 Petition For Writ Of Habeas Corpus, ¶39a.vii).

[4] R. 71 Petition For Writ Of Habeas Corpus, ¶39a.viii.

[5] District Attorney's File, Document 850 (August 11, 1980 law enforcement teletype memo authorized by Sergeant Roby stating that Gary Cone is a "drug user"); Document 779 (August 11, 1980 teletype document indicating Gary Cone's drug usage) (R. 71 Petition For Writ Of Habeas Corpus, ¶¶39a.ii & 39a.iii & Exs. 6 & 7).

[6] District Attorney's File, Document 852 (Teletype from Sergeant Roby which states that "suspect is a heavy drug user") (R. 71 Petition For Writ Of Habeas Corpus, ¶39a.i & Ex. 5).

"needed to work on his drug problem."[7]

Third, the prosecution withheld evidence showing that the F.B.I. likewise knew that Gary Cone had a severe drug problem, evidence which would have impeached Agent Flynn and would have shown that jury the misleading nature of Flynn's testimony indicating that Gary Cone was not insane. That evidence included: (1) numerous nationwide F.B.I. alerts stating that Gary Cone was indeed a heavy drug user;[8] (2) an FBI document showing Gary Cone's possession of large amounts of amphetamines in the late 1970s;[9] and (3) proof that, prior to testifying, Agent Flynn had access to Dr. Jonathan Lipman's report in the F.B.I. file, which demonstrates that Flynn was not a disinterested, truthful witness, but a biased witness who was collaborating with the prosecution and coached about how to rebut the defense case.[10]

Fourth, the prosecution withheld evidence showing that Ilene Blankman was likewise untruthful and not disinterested when she claimed at trial that Gary never used

[7] District Attorney's File, Document 507 (Statement of Sue Cone to Officer Roby)(R. 71 Petition For Writ Of Habeas Corpus, ¶39a.vi).

[8] FBI File, Documents 129-130; 140; 142; 143-144; 159; 164; 174-183; 239-240; 257-262, 265-267, 343-344 (teletypes describing Gary Cone as "drug user" and "heavy drug user") (R.71 Petition For Writ Of Habeas Corpus, ¶¶39e & Exs. 8, 9, 10, 11, 12, 13, 14, 15, 17).

[9] FBI File, Documents 171-173 (Teletype from Oklahoma City to Chicago, Little Rock and Memphis, dated August 13, 1980, stating that "While in prison, Cone was caught in possession of 850 amphetamine pills which had been supplied to him...") (R. 71 Petition For Writ Of Habeas Corpus, ¶39e.ix & Ex. 16).

[10] F.B.I. File, Documents 7-26 (R. 71 Petition For Writ Of Habeas Corpus, ¶39i.iv).

drugs. Specifically, the prosecution withheld evidence showing: (1) Blankman's pre-trial statement to prosecutors was inconsistent with her testimony at trial, because she never stated that Gary Cone showed no indication of using drugs;[11] (2) Blankman had a cozy relationship with the prosecutors and was biased against Gary Cone, as evidenced by the prosecutors' ongoing contact with her, their providing for her review her pretrial statements on more than one occasion (showing that she was being coached),[12] the prosecutors' dining with her during the trial itself;[13] and the prosecution's special "thank you" to her after the trial, when no other lay witness received any such treatment;[14] and (3) evidence that she did not deny testifying falsely at trial.[15]

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[11] District Attorney File, Documents 1750, 1752 (Handwritten notes of prosecution interview with Blankman in which she never stated damaging information against Gary Cone) (R. 71 Petition For Writ Of Habeas Corpus, ¶39i.v).

[12] District Attorney File, Documents 783 (February 9, 1982 letter from prosecutor Joseph Patterson to Ilene Blankman, which confirms that he had contacted her earlier, and in which he provided her statement); 789 (A second letter, dated March 22, 1982, from prosecutor Joseph Patterson to Ilene Blankman, confirming a telephone conversation with Ms. Blankman concerning her court appearance, and once again providing her a copy of her statement to the police) (R. 71 Petition For Writ Of Habeas Corpus at ¶39i.i & i.ii).

[13] F.B.I. File, Document 4-5 (Blankman ate dinner with the prosecutors during trial) (R. 71 Petition For Writ Of Habeas Corpus, ¶39i.iii).

[14] District Attorney File, Document 691 (April 27, 1982 letter from prosecutors Joseph Patterson and Don Strother thanking Blankman for her assistance) (R. 71 Petition For Writ Of Habeas Corpus, ¶39i.vi).

[15] F.B.I. File, Document 4-5 (when confronted with allegations that she had testified falsely at trial, Blankman refused to respond) (R. 71 Petition For Writ Of Habeas Corpus, ¶39i.iii).

The District Court denied claims arising from the withheld District Attorney and F.B.I. documents.

3.
PRESENTATION OF FALSE INFORMATION TO THE JURY

With the critical dispute at trial being Gary Cone's sanity, the prosecution convinced the jury to convict and impose the death sentence by falsely arguing that money found in Gary Cone's car showed drug dealing, and not drug usage. Specifically, the prosecution argued against the insanity defense by claiming that cash found in the car demonstrated that Gary Cone sold drugs, not that he used drugs: "I'm not trying to be absurd, but he says he's a drug addict. I say Baloney. He's a drug seller. Doesn't the proof show that? Well, let's see what we found in this car . . ."(Final Argument at TR 2015). The trial court sustained an objection to this line of argument, Id., but then the prosecution continued in the same vein, arguing that the money in the car showed not drug usage, but drug selling: "What was in that car? You have the benefit of what was in that car. Sure, he had a drug store in that car. What else did he have? I believe Sergeant Roby said that he had $2,400 and some odd cents in American currency. Did he get it from working? I submit to you that he did not. . . ." (Final Argument at TR 2016). The prosecution later continued with its assertion that the money found in the car was proceeds from drug sales, and not proof of drug addiction or insanity: "The only thing that we ever had that he used drugs, period, is

the fact that those drugs were in the car and what he told people. . . . ."(Rebuttal Argument at TR 2068).

In the United States District Court, Gary Cone alleged that the prosecution's arguments were false and known to be false, because the prosecution knew that the money in the automobile had actually come from an unrelated robbery of a Big Star supermarket. Indeed, during post-conviction proceedings, it was shown that $1,893.72 was taken from the Big Star. (Post Conviction I, Don Strother at TR 19). The money recovered from the car was $2,459.94. (Post Conviction I, Don Strother at TR 20). Yet it was also established that only $5,66.22 was ever transferred from the Police Department to the Shelby County Criminal Court Clerk's Office to be used as evidence against Mr. Cone. (Post Conviction I, Don Strother at TR 23). This means that exactly $1893.72 was not used as evidence -- the exact amount which was taken from the Big Star.

In fact, notes in Assistant District Attorney Strother's own handwriting confirm that he knew that $1,893.72 was taken from the Big Star. His handwritten notes prepared for indicting Gary Cone on that robbery state: "Stephenson's Big Star — $1,893.72." (R. 98 Memorandum In Support Of Petitioner's Motion For Evidentiary Hearing, Exhibit A). Further, the District Attorney File contains a letter from the Insurance Company of America demonstrating that they paid Big Star $2,013.72 as a

result of that robbery (Id., Exhibit B).[16] The District Court denied discovery and a hearing, and denied relief on the claim.

4.
ADDITIONAL CLAIMS OF CONSTITUTIONAL ERROR PRESENTED IN THE HABEAS PETITION

In habeas proceedings, Gary Cone also raised numerous other challenges to his conviction and death sentence, including: (1) Ineffective assistance of counsel at the guilt and sentencing phases of trial (Petition For Writ of Habeas Corpus, ¶¶ 40 *et seq*); (2) Unconstitutional instructions on the meaning of "reasonable doubt," Petition For Writ Of Habeas Corpus, ¶38; (3) The jury made an unconstitutional finding of the "great risk of death" aggravating circumstance (Tr. 2220); (4) The jury weighed an unconstitutionally vague "heinousness" aggravating circumstance (Tr. 2220); (5) The jury was given unconstitutional instructions on the element of malice (Petition For Writ Of Habeas Corpus, ¶37); (6) Sentencing instructions requiring unanimity precluded the full consideration of mitigating evidence (¶43, 47g); (7) Women were unconstitutionally excluded as grand jury forepersons for over a century (¶62); (8)

[16] Gary Cone requested discovery and an evidentiary hearing on this claim of prosecutorial misconduct (R. 95 Motion For Discovery; R. 96 Memorandum In Support; see also R. 97 Motion for Evidentiary Hearing, and R. 98 Memorandum in Support). He noted that he had not received a full and fair hearing on the claim in the state courts, because Don Strother had testified falsely at the post-conviction hearing. Specifically, Strother testified that there was nothing in the District Attorney "file which indicates anything whatsoever about the money that was taken from Big Star." (Post Conviction I, Don Strother at TR 20). The subsequent disclosure of the District Attorney's file reveals that this statement was false, given Strother's own handwritten notes concerning the amount of money taken from the Big Star, and the insurance letter concerning the money taken from the Big Star.

Gary Cone was denied the right to counsel during trial because he was precluded from sitting with counsel (¶65). The District Court denied relief on all these claims as well.

B.
THE COURT OF APPEALS GRANTS HABEAS RELIEF

On appeal, the Sixth Circuit reversed the judgment of the district court and granted relief on Gary Cone's claim that he was denied the effective assistance of counsel at sentencing because counsel failed to investigate and present mitigating evidence, and failed to make a closing argument asking that the jury spare his life. As more fully discussed *infra*, the court of appeals addressed the claim at length, concluding that counsel's failure to present mitigating evidence and make a closing argument for life deprived Gary Cone of the effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), and that he was therefore entitled to habeas corpus relief under 28 U.S.C. §2254(d). See Cone v. Bell, 243 F.3d at 975-979.

Given the court's grant of relief as to sentence, the court of appeals pretermitted consideration of various claims of constitutional error relating to the imposition of the death sentence. Cone v. Bell, 243 F.3d at 975. The court of appeals denied relief on all other claims. Cone v. Bell, 243 F.3d at 968-975.

C.
POST-JUDGMENT PROCEEDINGS IN THE SIXTH CIRCUIT

Following the court of appeals' ruling, the Warden filed a petition for rehearing and suggestion for rehearing *en banc*. In support of his suggestion, the Warden asserted that "the panel decision erroneously applied a *de novo* standard of review with respect to Cone's ineffective assistance of counsel claim contrary to 28 U.S.C. §2254(d) . . . ." Warden's Certification Of Grounds For Rehearing: Petition For Rehearing *En Banc*, pp. ii-iii. In response to the Warden's petition, Gary Cone respectfully noted that Warden had misstated the record in making such an assertion. Responding to the Warden's petition, Gary Cone succinctly stated:

> The essence of [the Warden's] complaint, however, is that the panel supposedly misapplied Williams v. Taylor, 529 U.S. 362 (2000) by engaging in *de novo* review of Gary Cone's *Strickland* claims. The very nature of Appellee's complaint – which itself is wholly unfounded (*See infra*) – does not warrant any exceptional review.
>
> Even so, [the Warden's] rehearing petition is based upon the patently incorrect assertion that the panel "applied a *de novo* standard of review with respect to Cone's ineffective assistance of counsel claim contrary to 28 U.S.C. §2254(d) and *Williams v. Taylor*," 529 U.S. 362 (2000)." Rehearing Petition, p. iii. This assertion is simply not true.
>
> In fact, the panel was *explicit* in stating that it was not engaging in *de novo* review. The panel made clear that its review of Gary Cone's ineffective assistance of counsel claims was constrained by 28 U.S.C. §2254(d):
>
> > [T]he state of Tennessee has held that Cone's lawyer's behavior was not ineffective under *Strickland* and we may

> not disturb that ruling unless we are convinced that it constitutes a 'decision that is contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.' 28 U.S.C. §2254(d)(1).

Cone, slip op. at 30. This vital portion of the panel's opinion – which demonstrates the invalidity of Appellee's claim – is conspicuously absent in the rehearing petition itself.

Appellee has thus clearly misapprehended the panel's ruling when he claims that the panel acted erroneously in not applying 28 U.S.C. §2254(d). In a careful analysis, Judges Ryan, Merritt, and Norris certainly did apply that provision. The opinion speaks for itself and refutes Appellee's misleading assertion to the contrary.

Gary Bradford Cone's Response To Petition For Rehearing *En Banc*, pp. 1-2.

The Sixth Circuit *en banc* agreed that rehearing was unwarranted. No judge of the *en banc* court found the Warden's petition worthy of a vote. The petition was denied. See Cone v. Bell, 2001 U.S.App.Lexis 11606 (6th Cir. June 1, 2001)(noting "no judge of this court having requested a vote on the suggestion for rehearing en banc . . .")

THE PETITION SHOULD BE DENIED

I.
PETITIONER MISSTATES THE RULING BELOW IN THE QUESTION PRESENTED

In the petition, the Petitioner claims that certiorari should be granted because the court of appeals "appl[ied] a *de novo* standard of review to a habeas petitioner's

ineffective assistance of counsel claim . . . ." Petition, p. i, Question Presented I. Like Petitioner's misleading assertions to the *en banc* Sixth Circuit, this is yet again a clear misstatement of the ruling of the court of appeals.

The court of appeals not *once* but *twice* stated the standard of review which it applied to the facts. First, before analyzing the ineffective assistance of counsel claim, the court of appeals stated in no uncertain terms the proper standard of review:

> A federal court will not grant *habeas corpus* relief unless the state adjudication of the federal claim 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.' 28 U.S.C. §2254(d)(1)((West Supp. 2000)

Cone v. Bell, 243 F.3d at 967-968. The court of appeals never so much as intimated that it was applying a *de novo* standard of review. Contrary to Petitioner's assertions, the court of appeals made eminently clear that it was applying 28 U.S.C. §2254(d)(1) to review the state court's treatment of Gary Cone's claims.

Then when ultimately granting relief, the court of appeals *again* stated that it was applying the standard of review contained in 28 U.S.C. §2254(d)(1). The court of appeals once again was explicit in its reasoning that relief was required under 28 U.S.C. §2254(d)(1):

> [T]he state of Tennessee has held that Cone's lawyer's behavior was not ineffective under *Strickland* and we may not disturb that ruling unless we are convinced that it constitutes a 'decision that is contrary to, or involved an unreasonable application of, clearly established Federal law, as

> determined by the Supreme Court of the United States.' 28 U.S.C. §2254(d)(1). We conclude that Cone's counsel's refusal to offer any evidence in mitigation and refusal even to address the jurors to ask them to spare Cone's life because counsel feared the prosecutor might make a 'devastating' argument denied Cone his Sixth Amendment right to counsel at sentencing and that the Tennessee court's conclusion to the contrary is an unreasonable application of the clearly established law announced by the Supreme Court in *Strickland*.

Cone, 243 F.3d at 979.

In sum, in seeking certiorari (as he did in seeking *en banc* review), Petitioner has misstated and mischaracterized the record. Not only did the court of appeals *not* apply an improper standard of review, it made clear more than once that was applying the standard of review which Petitioner tries to claim was not applied. Given this clear mischaracterization of the record, Petitioner is thus asking this Court to review an issue which is not even presented by the judgment below. Given these circumstances, the petition must be denied.[17]

II.
PETITIONER MERELY REQUESTS REVIEW OF SETTLED LEGAL PRINCIPLES TO UNIQUE, NON-RECURRING FACTS

The court of appeals merely applied settled legal principles to the unique facts

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[17] References to *de novo* review in the opinion refer to the standard which the Sixth Circuit uses to review holdings of the district court: "We review de novo the district court's disposition of a petition for habeas corpus." Cone, 243 F.3d at 966-967. The panel was not applyi g a de novo standard of review to the state court's findings.

below. Not only did the court of appeals carefully articulate and apply the standard of review contained in 28 U.S.C. §2254(d)(1), (Cone, 243 F.3d at 967-968, 979) the court of appeals also carefully and properly stated the standard governing the ineffectiveness claim.

Quoting directly from this Court's opinion in *Strickland v. Washington*, 466 U.S. 668 (1984), the court of appeals stated:

> To repeat, in order to succeed on an ineffective assistance of counsel claim, a petitioner must show:
>
> > First, . . . that counsels' performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversarial process that renders the result unreliable.

Strickland, 466 U.S. at 687,104 S.Ct. 2052.

Under the first prong of *Strickland*, we must determine whether Cone's counsel, in remaining completely silent during the sentencing phase of the trial, except to declare that he 'rested' – offering no evidence in mitigation and declining to address the court and jury – acted within an objective standard of reasonableness. *Olden v. United States*, 224 F.3d 561, 565 (6th Cir. 2000). If he did not, we must then turn to the second prong of *Strickland* and determine whether the petitioner has demonstrated a reasonable probability that he would not have been sentenced to death but for his counsel's failure. *Strickland*, 466 U.S. at 693-94, 104 S.Ct. 2052.

Cone, 243 F.3d at 976-977.[18] After having stated these unquestionable principles from *Strickland*, the court proceeded to apply *Strickland* (Cone, 243 F.3d at 977-978) after which the court of appeals concluded, as noted *supra*, that in light of *Strickland* and 28 U.S.C. §2254(d)(1), Gary Cone is entitled to habeas corpus relief. Cone, 243 F.3d at 979.

Petitioner, therefore, makes the unexceptional request that this Court grant certiorari to review properly-stated, settled legal principles to the unique facts of this case. Under such circumstances, certiorari is simply not warranted. See U.S.S.Ct.R. 10 (certiorari not warranted where lower court applied facts to properly stated rule of law); Kyles v. Whitley, 514 U.S. 419, 456 (1995)(Scalia, J., dissenting).

Moreover, there is little question that the bare application of settled principles to the facts in this case is even *less worthy* of certiorari than in non-certworthy cases involving application of law to the facts, because the factual circumstances of this case are unique. This is a unique case which involves not only failure to present any mitigating evidence *but also* an abject failure to make a closing argument on Gary Cone's behalf. Compare Overton v. Ohio, 534 U.S.___, 2001 U.S. Lexis 9937 (2001)

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[18] The Sixth Circuit opinion also refers to U.S. v. Cronic, 466 U.S. 648 (1984), which was decided the same day as Strickland. Cronic discusses instances in which prejudice may be presumed by a court in determining whether counsel was ineffective, as when there has been an actual or constructive total abdication of advocacy. Cronic does not set forth a different test, but merely restates the test set forth in Strickland. Strickland itself notes that prejudice is presumed where there has been the denial of the assistance of counsel. Strickland, 466 U.S. at 692.

(Breyer, J., dissenting from denial of summary reversal)(Supreme Court is not error correction court and even where summary reversal is improperly withheld, certiorari still not appropriate where legal principles have been settled and issue apparently will not recur in future).

III.
THE PETITION PRESENTS AT MOST A REQUEST TO RESOLVE AN INTRACIRCUIT CONFLICT, AND THERE IS NO CONFLICT AMONG THE CIRCUITS

In requesting review, Petitioner also claims that there is conflict in the lower courts, implicilty asserting that the Sixth Circuit's application of the law to the facts here is in conflict with, *inter alia*, Martin v. Rose, 744 F.2d 1245 (6th Cir. 1984) and Green v. Arn, 809 F.2d 1257 (6th Cir. 1987), *vacated on other grounds*, 484 U.S. 806 (1987), and claiming the panel opinion is in conflict with the decisions of other circuits. See Petition, p. 20 *et seq*. Petitioner's assertions are illusory.

A.
PETITIONER IS REQUESTING THAT THIS COURT RESOLVE AN INTRACIRCUIT DISPUTE WHICH WAS NEVER RAISED IN THE COURT OF APPEALS

First, contrary to Petitioner's assertions, there simply is no conflict between the Court of Appeals' judgment and its prior judgments in Martin and Green. In Martin and Green and Cone, the Sixth Circuit properly recognized that certain actions of counsel require a finding that there has been a violation of the Sixth Amendment:

(1) When counsel is mute during the trial (Martin); (2) When counsel is not present in the courtroom (Green); and (3) when counsel presented no evidence and stood mute at closing argument following the prosecution's request for death (Cone). The Court of Appeals' judgment is fully consistent with its prior holdings in Martin and Green.

Nevertheless, with Petitioner disputing the correctness of the Court of Appeals' judgment in light of Martin and Green, certiorari should be denied, because this case thus presents nothing more than a request for this Court referee an internal Sixth Circuit dispute about the application of Martin and Green to the facts here -- a dispute which the Petitioner never even took to the Sixth Circuit *en banc*. This Court's certiorari jurisdiction is not properly invoked to resolve an intracircuit conflict, See Davis v. United States, 417 U.S. 333, 340 (1974), much a less an intracircuit conflict on which the Petitioner never sought *en banc* review.

B.
THERE IS NO INTERCIRCUIT CONFLICT

Perhaps the reason Petitioner never sought *en banc* review on the basis of any purported conflict is that in reality, there is no conflict within the Sixth Circuit, just as there is no conflict among the circuits. In claiming that there is some purported lack of clarity and conflict in the lower courts concerning when prejudice is established in ineffectiveness cases, Petitioner merely recites fact-specific cases from various courts in which prejudice was found. All of the cases cited by Petitioner, however, recognize

the unexceptional principle that lack of advocacy by counsel – whatever the cause – establishes the type of prejudice which the Sixth Amendment cannot (and does not) countenance.

The cases cited by Petitioner are simply cases in which the courts have merely applied Sixth Amendment principles to different facts. The "conflict" proposed by petitioner is thus fictional. Rather, such cases have been decided differently because the particular facts of each case are different – some warranting relief and others not. The differences among such cases are not traceable to legal differences, but to the unique facts of the various cases.

There is thus no conflict in the circuits, a truth which even Petitioner's question confirms. The very fact that Petitioner's question 2 is lengthy and focuses on the unique facts of this case again confirms that Petitioner's request for review is based on a claimed misapplication of law to the facts, not on any conflict in legal principles. Certiorari is therefore not warranted. U.S.S.Ct.R. 10.

IV.
THE JUDGMENT BELOW IS CORRECT

Fundamentally, the court of appeals' recognition that Gary Cone is entitled to relief is correct, and the court of appeals' conclusion is unexceptional. Applying the law of *Strickland* to the unique facts at hand, the court of appeals undertook a lengthy analysis in which it made numerous correct and unexceptional statements:

(1) "[G]iven the uniqueness of the death sentence, the absence of any mitigating evidence, combined with a waiver of oral argument plainly raises a 'red flag.'" Cone, 243 F.3d at 977;

(2) "[W]here the waiver [of closing argument] is not based on a sentencing strategy, or is based upon a decision called 'strategy' which no reasonable observer could credit as involving any logically defendable analysis, the attorney may have performed in a deficient manner." Id.;

(3) "An attorney's decision to present no evidence whatever in mitigation and, *in addition*, to offer no argument when his client faces the prospect of being sentenced to death may amount to a virtual abandonment of the adversarial process that results in injustice, thus demonstrating both deficient performance and prejudice." Id., 243 F.3d at 977-978 (emphasis in original);

(4) "Where mitigating evidence was available, but not adequately investigated and not presented at sentencing, this 'does not reflect a strategic decision, but rather an abdication of advocacy.'" Id. at 978;

(5) "A trial lawyer accused of constitutional ineffectiveness for failing to act where action is ordinarily indicated will almost always have a reason for declining to act. The reason will usually be called the lawyer's 'strategy.' But the noun 'strategy' is not an accused lawyer's talisman that necessarily defeats a charge of constitutional ineffectiveness. The strategy, which means 'a plan, method, or series of maneuvers or strategems for obtaining a specific goal or result,' Random House Dictionary 1298 (Rev. ed. 1975), must be reasonable. It need not be particularly intelligent or even one most lawyers would adopt, but it must be within the range of logical choices an ordinarily competent attorney handling a death penalty case would assess as reasonable to achieve a 'specific goal.'" Id.

After stating these undisputed principles, the panel then undertook an extensive application of the law to the unique facts here. The panel's analysis is cogent. First, the

panel acknowledged that there was no legitimate justification for failing to argue for Gary Cone's life after the prosecution resoundingly demanded his death:

> *Here, the goal, the only conceivable goal, was to persuade the jurors not to sentence Cone to death. How counsel's refusal even to ask the jurors to do that could be called a reasonable strategy to achieve the goal, eludes us.*

> Even if we add up all of counsel's claimed strategic tactics, only one of which was apparently credited by the Tennessee appellate courts and the district court below – avoiding a 'devastating argument by the prosecutor – we think a reasonable attorney would have realized the absolute necessity of arguing for his client's life by making a closing argument. In addition, counsel had plenty of mitigating evidence at his fingertips; yet he failed to present it at the sentencing phase.
>
> *We reject out of hand, the argument that a competent attorney would determine that not presenting mitigating evidence of any kind and not making a final argument in a death penalty case is a justifiable 'strategy' because doing so might trigger a 'devastating' response by the prosecutor – the sole reason assigned by the Tennessee courts for excusing counsel's silence. How much worse off could Cone have been if he were sentenced to death after a 'devastating' argument by the prosecutor than if he were sentenced to death after the prosecutor's 'mild' request that he be sentenced to death, which was followed by his own attorney's silence? How much more devastating for the petitioner could the prosecutor's 'devastating' argument have been than the death sentence the petitioner got without such argument.*

Cone, 243 F.3d at 978-979 (emphasis supplied).

The panel further made clear that, in context, counsel's errors were so egregious that they ensured a death sentence in the eyes of the jury:

> We can only imagine the effect on the jurors when Cone's defense

> counsel refused even to ask them to spare his client's life. They could only have inferred that Cone's counsel was, by his silence, acquiescing to the prosecutor's plea that Cone be sentenced to death. *See Stewart*, 140 F.3d at 1270. Cone may well have fared better if his counsel had left the courtroom entirely for the sentencing phase of trial. If that had occurred, the jurors could not have inferred, as indeed they must have, that counsel's knowing and purposeful silence was an implicit agreement that justice required that Cone be put to death. When a man faces the gallows and his attorney sitting next to him declines even to ask the jurors to spare his life in the name of simple mercy, the attorney ought to have a most compelling reason for failing to speak – one that would incline a reasonable observer to credit as a sentencing strategy that is legally and factually justified. *The reasons Cone's counsel has given are totally unreasonable, given the stakes. This was not 'strategic' representation; it was nonrepresentation of the most deadly sort.*

Id., 243 F.3d at 979 (emphasis supplied). As noted *supra*, in concluding, the panel then specifically discussed both Strickland and 28 U.S.C. §2254(d)(1) to conclude that habeas relief is mandated. Cone, 243 F.3d at 979.

Nothing about the panel's analysis is either incorrect or exceptional. The panel's conclusion in applying settled principles to the unique facts here was correct. Certiorari should be denied. See also U.S.S.Ct.R. 10.

V.
BECAUSE THE JUDGMENT BELOW MUST BE AFFIRMED ON NUMEROUS ALTERNATIVE BASES, THIS CASE PRESENTS A POOR VEHICLE FOR REVIEW

Finally, this case presents numerous alleged violations of Gary Cone's constitutional rights, violations which entitle him to habeas relief. See pp. 1-9, *supra* (detailing numerous constitutional violations occurring at trial). Because the lower

court judgment is correct in light of these additional constitutional violations, the court of appeals' judgment will not be affected by this Court's resolution of the unique, fact-bound right to counsel claim.[19] Similarly, this Court does not resolve constitutional issues unless necessary. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-347 (1936)(Brandeis, J., concurring). The writ, therefore, should be denied.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully Submitted,

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[19]Gary Cone may defend the lower court's judgment on each alternative bases presented below, and he does so here, incorporating all grounds presented below and noted herein.